

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
PERRY SMITH and	:	
KEVIN CLEVELAND	:	NO. 04-CR-472

MEMORANDUM

Gene E.K. Pratter, J.

November 22, 2004

INTRODUCTION

Defendants Perry Smith and Kevin Cleveland move to suppress various pieces of evidence, including the arrest and items seized from the Defendants, any statements by the Defendants following the arrest (specifically, the only statement is that taken from Perry Smith), any identification of the Defendants, and any additional information and evidence that was developed from the suppressed information and evidence. The Defendants argue that the police did not have probable cause when they arrested the Defendants, so the arrest, the search and seizure of any items, and Smith's statement to the police are all a result of the unlawful arrest and should be suppressed. Additionally, the Defendants argue the identifications were unnecessarily and overly suggestive and, therefore, tainted. Finally, Defendants contend that the statement by Smith was obtained without prior meaningful Miranda warnings and was coerced.

The government asserts that the police had probable cause for the arrest, the identifications were only marginally, but not impermissibly, suggestive and the technique used was appropriate under the circumstances, and Smith received proper Miranda warnings and was

not coerced into giving his statement.

For the following reasons, the Court finds the government's positions on these issues are supported by the evidence presented at the evidentiary hearing convened to consider the Motions, and, therefore, the Motions are denied.

BACKGROUND

Defendants Perry Smith and Kevin Cleveland both are charged with (1) conspiring to commit a robbery of Shernoff Salads Company thereby interfering with interstate commerce in violation of 18 U.S.C. § 1951, (2) interference with interstate commerce by robbing Shernoff Salads Company in violation of 18 U.S.C. § 1951, and (3) the use of firearms during a crime of violence in violation of 18 U.S.C. § 924. Defendant Kevin Cleveland is also charged individually with (1) carjacking in violation of 18 U.S.C. § 2119, and (2) use of a firearm during a crime of violence in violation of 18 U.S.C. § 924. The Court held an evidentiary hearing over the course of three days to address the pending Motions as well as several other motions submitted by the Defendants. The factual substance of the testimony presented during the evidentiary hearing is as follows.

On or about the night of August 13, 2003, a pizza delivery man, Terry Muchison, was approached by a man who displayed a firearm and demanded that Muchison empty his pockets. (Tr. 10/22/04 at 81-82). Muchison complied and gave over everything in his pockets, including some money, his wallet, and the keys to his car. (*Id.* at 82-83). The armed man took Muchison's 1990 Ford Tempo with Pennsylvania tag EYX4649. (*Id.* at 83).

While reporting this incident to the police, Muchison provided a description of his assailant. (*Id.* at 84). Muchison was also asked to review photographs in a book, but did not see

a picture of his assailant in the book. (Id. at 84-85). Muchison was called back to the police station two days later and was shown a photo spread with eight photographs. (Id. at 85). Muchison identified his assailant, circled the photograph of his assailant, and signed the photo spread. (Id.) The photograph Muchison identified as his assailant was the photograph of Cleveland put in the photo spread by Detective Thorsten Lucke. (Id. at 109-10). Muchison also identified Cleveland as the assailant during the evidentiary hearing. (Id. at 80).

The Shernoff Salads Company was robbed on August 14, 2003 by two gunmen who brandished firearms and threatened the store owner, Jeffrey Shernoff. (Id. at 7). The gunmen stole money from two Company cash boxes, a cash register, and an employee's purse before fleeing. (Id. at 9-10). Throughout this encounter, Mr. Shernoff had a clear, frontal view of both gunmen. (Id. at 14-15). Mr. Shernoff identified these men during the hearing as the Defendants Perry Smith and Kevin Cleveland. (Id. at 6). During the robbery, Mr. Shernoff was able to leave the inner office and warn the other employees of the robbery. (Id. at 12). While outside of the office, Mr. Shernoff heard a gunshot from inside the office. (Id.) Upon hearing the gunshot, Mr. Shernoff headed back towards the office, and saw the two gunmen leave the office and head towards the door on their way to leaving the building. (Id. at 13).

One of the employees Mr. Shernoff warned about the robbery was Robert Robinson, who was standing approximately 20 feet from the office door at the time of the foregoing events. (Tr. 10/21/04 at 10). Shortly after being alerted to the robbery, Robinson saw a man with a gun leave the office. (Id. at 12). Robinson and this man looked at each other before the man ran out the door and out of the building. (Id. at 12-13). (Robinson identified this man at the hearing as Kevin Cleveland. (Id. at 16)). A couple of seconds later, another man came out of the office and

immediately headed toward the exit. (Id. at 13-14). Robinson was only able to see the right side of this man's face. (Id. at 14). (At the hearing, Robinson identified the second man as Perry Smith. (Id. at 16)).

Robinson went to the exit and, observing through the door's peephole, watched the two men enter a gray Oldsmobile. (Id.). Robinson identified Cleveland as the man who got in the passenger side of the car, and Smith as the man who entered the driver side of the car. (Id.). Robinson then watched the car proceed onto I-76 east expressway. (Id. at 17).

After the robbery, Mr. Shernoff returned to the office and found his cousin, Heidi Shernoff, shot in the stomach. (Tr. 10/22/04 at 14). Mr. Shernoff called the police, who arrived a few minutes later and took Mr. Shernoff's statement. (Id. at 16-17). The first officer to arrive was Officer Chris Lai, who received a radio call of a robbery at Shernoff Salads. (Id. at 125). Officer Lai saw an African-American man, later identified as Robinson, outside of Shernoff Salads waving to him. (Id. at 126). Robinson gave Officer Lai a description of the men he had seen and of the gray Oldsmobile, which descriptions Officer Lai transmitted over the police radio. (Id. at 126).

After hearing the flash description of the car, Officer Randy Vogt saw a car matching the description exit I-76 East onto Penrose Avenue. (Tr. 10/26/04 at 52-53). Officer Vogt, in a police wagon, attempted to pursue the vehicle, but was unable to follow it. (Id. at 53-54). Officer Vogt transmitted information about the car over the police radio as well as information that it was heading eastbound on Penrose Avenue near 20th Street, that four people were in the car, and that the driver had "bushy" hair. (Id.).

Soon after Officer Vogt's report, a car matching the description was found unattended by

Officer John Thomas in Roosevelt Park, which is near the location the car was last seen by Officer Vogt. (Id. at 18). Officer Thomas initiated a computer check with respect to the tags on the car, which were EYX4649 (the tags from Muchison's stolen Ford Tempo), and held the car as part of a crime investigation. (Id.). Officer Thomas also took statements from witnesses in the Park area who reported seeing three black males flee from the gray Oldsmobile in the direction of the lake east of the roadway. (Id.). Officer Thomas relayed this information over the radio. (Id. at 19). Officer Thomas also looked inside the car and saw on the front passenger seat of the car a white envelope with the letterhead "Shernoff Salads." (Id.).

Several officers responded to the various flash reports and entered into Roosevelt Park. One officer, Officer Gary Capuano, testified that as he was entering the Park, he and his partner observed a black male running towards the lake. (Id. at 5-6). Officer Capuano also testified that, before pursuing the fleeing man, he was informed by another officer that the other officer had recovered the vehicle believed to be involved in the Shernoff Salads incident (although earlier in his testimony Officer Capuano had stated that he had not spoken to any officers before apprehending the suspects). (Id. at 7, 13-14). The fleeing man ran into the lake, but came out of the lake when the police ordered him to do so. (Id. at 6). This man has been identified as Defendant Smith. (Id.). Once Smith came out of the lake, Officer Capuano and his partner placed Smith on the ground and handcuffed him. (Id.).

Officer Dion Green also responded to the flash reports and entered Roosevelt Park. (Id. at 24). While driving through the Park, Officer Green was stopped by passers-by who reported seeing black males fleeing from other police officers. (Id. at 25). Officer Green headed in the direction the passers-by told him the men were fleeing and saw a man in the water being ordered

out by other officers. (Id.). Officer Green then noticed some hair protruding at the water surface and began to order out another person who he believed was hiding under the water. (Id.). That person, identified as Defendant Cleveland, had “bushy” hair and came out of the water following which he handcuffed by other officers. (Id. at 25-26).

Officer John Flynn was also in Roosevelt Park with his partner, responding to the police reports. (Id. at 38). Officer Flynn assisted in arresting and handcuffing Smith. (Id. at 39). Officer Flynn was present for a witness’s identification of Smith as having been one of the gunmen at Shernoff Salads and was ordered to place Smith in investigatory detention after this identification. (Id. at 40). Officer Flynn then performed a search of Smith, after noticing a bulge in his pockets, during which he found a cell phone and \$2,356 in cash. (Id. at 40-41). Officer Flynn also observed Officer Muscarnero take live rounds from Smith, after Officer Flynn had finished his search. (Id. at 41).

Both Robinson and Mr. Shernoff were brought to the lakes in the Park by the police. Robinson, who arrived first, was taken to the Park by Sergeant Mason, who asked him if he could identify the cars and men and informed Robinson that the police had pulled over a car. (Id. at 60). Upon arriving, Robinson identified the gray Oldsmobile under police control as the car he had seen leaving the scene at Shernoff Salads. (Tr. 10/21/04 at 19). While in the police car and making the identification of the gray Oldsmobile, Robinson saw the Defendants being taken from the water and handcuffed by the police. (Id. at 64). Robinson was then shown each man individually, while they were dripping wet and Cleveland was without a shirt. (Id. at 66). Robinson was asked if they were involved in the Shernoff Salads robbery. (Id.). Robinson identified Smith and Cleveland as the men he saw leave the Shernoff Salads office. (Id. at 22).

Robinson saw the Defendants again that same day, this time when they were detained at the police station. (Id. at 72). Robinson was at the station to give his report. (Id.).

Mr. Shernoff was taken to Roosevelt Park by Officer Ciocca, who told him he was being escorted to a location to see if he could identify some suspects. (Tr. 10/22/04 at 17, 43). Mr. Shernoff was taken to the police wagon, where Smith was being detained in the back. (Id. at 18). Mr. Shernoff identified Mr. Smith as one of the robbers. (Id.). Mr. Shernoff then identified Mr. Cleveland as the other robber, while Cleveland was in the back of police car. (Id. at 19). Later that day, Mr. Shernoff saw the Defendants at the police station in an enclosed glass area. (Id. at 49). Before the evidentiary hearing, Mr. Shernoff also saw photographs of the Defendants that were in possession of police officers. (Id. at 63).

After being arrested, the Defendants were taken to the police station. Detectives Conn and Lis interrogated Perry Smith. (Tr. 10/26/04 at 96). Smith signed and dated a question and answer sheet, the first page of which delineates his Miranda rights. (Defense Exhibit 1). Each question is answered with a waiver of his rights and initialed. The document also appears to be signed by Perry Smith at the bottom. The date and time on the document is August 14, 2003 at 3:20 p.m. Perry Smith's fiancée, Blanche Walker, who testified that she has seen his signature many times, testified that the signature on the bottom of this page is not Smith's. (Tr. 10/21/04 at 87). However, no comment was made as to the authorship of the initials "P.S." next to each answer on the Miranda questionnaire. Furthermore, Detective Conn testified that Smith was advised of his rights prior to giving his statement.

Smith also signed a three-page typed statement. (Government's Exhibit 1). Detective Lis reported that there were various delays during the taking of the statement, which process began at

3:20 p.m., but was not completed with Smith's signature until 7:40 p.m. (Tr. 10/26/04 at 100-101). Nonetheless, each page of the statement appears to be signed and dated by Perry Smith. Ms. Walker, Smith's fiancée, confirmed that the signatures on page 1 and 3 of the actual statement are Smith's, but she testified that the signature on page 2 with the Miranda colloquy not look like his. (Tr. 10/21/04 at 88). Detective Conn testified that Smith voluntarily and knowingly signed the statement.

DISCUSSION

A. Probable Cause for Arrest

A warrantless arrest for a felony is allowed in a public place if the officers have probable cause to make the arrest. Maryland v. Pringle, 124 S.Ct. 795, 799 (2003); Beck v. Ohio, 379 U.S. 89, 91 (1964). Probable cause depends on "whether at that moment [of arrest] the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Beck, 379 U.S. at 91. Probable cause is not a scientific measurement, but "deals with probabilities and depends on the totality of the circumstances." Pringle, 124 S.Ct. at 800.

Probable cause is initially a factual analysis by the police at the time of arrest. U.S. v. Glasser, 750 F.2d 1197, 1206 (3d Cir. 1984). The Court must determine "whether the objective facts available to the officers at the time of the arrest were sufficient to justify a reasonable belief that an offense was being committed." Id. The Court must be cognizant of the fact that police officers may well "draw inferences and make deductions... that might well elude an untrained person." U.S. v. Cortez, 449 U.S. 411, 418 (1981). Therefore, probable cause occurs "when the

information within the arresting officer's knowledge at the time of the arrest is sufficient to warrant a reasonable law enforcement officer to believe that an offense has been or is being committed by the person to be arrested." Paff v. Kaltenbach, 204 F.3d 425, 436 (3d Cir. 2000).

The function of the Court is "to examine the totality of the circumstances---the knowledge and information which the officers possessed at the time of arrest, coupled with the factual occurrences immediately precipitating the arrest of the appellant---to determine if the constitutional standard of probable cause was met." U.S. v. Harris, 482 F.2d 1115, 1117 (3d Cir. 1973). In making this examination, the Court should be cognizant that police can rely on hearsay. See Adams v. Williams, 407 U.S. 143, 147 (1972) (holding "the subtleties of the hearsay rule should not thwart an appropriate police response"). In fact, the police can rely on a bulletin from other police to establish probable cause, and the Court's role is to determine if the initial bulletin was based on probable cause. U.S. v. Hensley, 469 U.S. 221, 232 (1984).

Given this legal landscape, the Court finds that there was probable cause for the arrests of Smith and Cleveland. The police were able to track the Defendants from Shernoff Salads to the Park by sightings of the gray Oldsmobile. Robinson saw this car leaving the scene and then identified it at the Park. Officer Vogt saw the car exiting the same expressway Robinson had seen it enter shortly before. Officer Thomas found the car at the Park where Smith and Cleveland were found. Inside that car, in plain view, was a Shernoff Salads Company envelope. Throughout the events ending in Smith and Cleveland's arrest, the police were reporting their findings over the police radio, thereby providing each officer with the probable cause to link the car at Shernoff Salads in which the robbers fled to the car found at the Park, which Park witnesses told the police was the car from which three black men were seen fleeing.

At the Park, the eyewitnesses who reported seeing the Defendants flee from the car link the Defendants to the gray Oldsmobile which had already been linked to the Shernoff Salads robbery. Probable cause is a question of reasonableness, and based upon the above, the police had reason to believe the Defendants were involved with the Shernoff Salads robbery. Furthermore, the Defendants' own behavior in the Park added to the probability that the Defendants were involved in the crime that prompted the police activity at issue. Finally, the Defendants were identified by both Robinson and Shernoff before the police placed them under arrest for the robbery of Shernoff Salads. Only after the identification was Smith searched. The issue for the Court is to determine, given the totality of the circumstances, if a reasonable police officer would believe the Defendants were involved in a crime. The Court is persuaded that the totality of the circumstances demonstrate that the officers in this matter acted reasonably and lawfully in arresting the Defendants. Since the arrest was lawful, the search was lawful as incident to a lawful arrest. None of the items seized thereafter will be suppressed.

B. Interrogation

If a person is in custody and being interrogated, certain procedural safeguards are necessary. Miranda v. Arizona, 384 U.S. 436, 444 (1966). These safeguards are the well-known Miranda warnings, and a party must voluntarily and knowingly waive his rights pursuant to a Miranda warning before an interrogation is lawful. Id. at 473-74. Additionally, if the police use unlawful coercive methods to secure a waiver or a statement, the statement was not voluntary and is inadmissible. Dickerson v. U.S., 530 U.S. 428, 436-37 (2000). This Court's role is to determine if the statements were made knowingly and voluntarily.

The Court finds that the government has sufficiently demonstrated that Smith's statement

in this matter was knowing and voluntary. Detective Conn, who, along with his partner Detective Lis, performed the interrogation, testified that Smith was informed of his rights and voluntarily waived them. No testimony or other evidence contradicts this fact.

The only testimony that raises any doubts is that of Blanche Walker, Smith's fiancée. Even without regard to the effect on her credibility prompted by her close relationship with Defendant Smith, the most that can be taken from Walker's testimony was that it was not Smith's signature that appeared on the Miranda form. She was not asked, nor did she state, whether the handwritten "yes" or "no" and the initial next to each of the Miranda form questions matched Smith's handwriting. Furthermore, Walker admitted on the witness stand that the signature on the second page of the questionnaire statement did not look like Smith's, although the signature on the first and third page were his signatures. Walker offered a possible reason for the discrepancy: "'Cause I wear glasses. I don't have my glasses." (Tr. 10/21/04 at 88). Given Walker's bias in favor of her fiancée and her potential vision impediment, the Court is not persuaded to either disregard or discard the testimony of Detective Conn. Therefore, the Court finds that Smith gave his statement after being informed of his rights, waived them voluntarily and knowingly, and voluntarily gave his statement.

C. Identification

An identification is inadmissible if it is "unnecessarily suggestive" and creates a "substantial risk of misidentification." U.S. v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995) (citing Virgin Islands v. Riley, 973 F.2d 224, 228 (3d Cir. 1992)). Suggestiveness hinges upon a determination of the reliability of the method used in connection with the identification. Id. To determine reliability, the Court must again look at the totality of the circumstances, including

“the witness’ original opportunity to observe a defendant and the degree of attention during that observation; the accuracy of the initial description; the witness’ degree of certainty when viewing a defendant or his image; and the length of time between the crime and the identification procedure.” Id. (citing Neil v. Biggers, 409 U.S. 188, 199-200 (1972); Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Riley, 973 F.2d at 228; Reese v. Fulcomer, 946 F.2d 247, 258 (3d Cir. 1991); U.S. v. Dowling, 855 F.2d 114, 117 (3d Cir. 1988)).

The Court should refrain from considering other factors, but should weigh only those factors that relate to reliability. Emanuele, 51 F.3d at 1128. The standard is whether there exists a “substantial risk of misidentification.” Riley, 973 F.2d at 228. “Show-up” identifications, such as here, must be measured by this same standard, but are allowed when certain exigencies confront the police (such as fear of eye-witnesses leaving the area). U.S. v. Gaines, 450 F.2d 186, 197 (3d Cir. 1971).

The Court assumes (thought Defendants’ Motions are by no means precise on this point) Defendants have concerns about the identifications made by Mr. Robinson, Mr. Shernoff, and Mr. Muchison. The Court is satisfied that Muchison’s identification of Cleveland was not impermissibly suggestive. Muchison was given an opportunity within hours of the carjacking to review photographs of various people, but did not identify any of them as the offender. Two days later, Muchison was given a sheet with eight photographs. Cleveland did not attempt to argue, nor does the Court find, that anything about these photographs or the array was suggestive. The witness selected Cleveland’s picture from the array. Muchison’s pretrial identification of Cleveland will not be suppressed.

The identifications by Mr. Robinson and Mr. Shernoff raise a somewhat more

challenging issue. Since the identifications by these two gentlemen involved only one person, while in police hands, and not a line-up or photo spread, a certain degree of suggestiveness is inherent in the circumstances. Furthermore, both Mr. Robinson and Mr. Shernoff saw the Defendants wet from having been in the lake. Although the identifications were arguably suggestive, the Court must determine if they were “unnecessarily suggestive.”

Under the balancing test outlined by the Court of Appeals of the Third Circuit in Emanuele, the Court finds that the suggestiveness of these identifications in the Park was counterbalanced by (1) the freshness of the robbers’ images in both Mr. Robinson’s and Mr. Shernoff’s minds, since less than an hour passed between the robbery at Shernoff Salads and the identification at the lake in the Park, (2) the fact that both witnesses testified that they had good looks in a well-lit environment at the robbers at Shernoff Salads’ premises, and (3) the fact that both witnesses expressed definitive identifications and did not equivocate on or question their identifications. Furthermore, the police’s choice of using a show-up is supported by the exigencies of not wanting to hold the Defendants for more time than needed if they were not identified, the reasonable interest in holding an identification while the images were fresh in the witnesses’ minds, and to not unnecessarily burden the witnesses by calling them in at a later date for additional identifications.

CONCLUSION

For the foregoing reasons, the Court denies the Defendants' Motions to Suppress as outlined above. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
PERRY SMITH and	:	
KEVIN CLEVELAND	:	NO. 04-CR-472

ORDER

Gene E.K. Pratter, J.

November 22, 2004

AND NOW, this 22d day of November, 2004, upon consideration of Defendant Perry Smith's First Motion to Suppress Statement (Docket No. 24), Defendant Perry Smith's First Motion to Suppress Items Seized and any Identification and Statements from Perry Smith (Docket No. 25), Defendant Kevin Cleveland's First Motion to Suppress (Docket No. 35), the Government's Response to Defendants' Motions to Suppress Evidence (Docket No. 49), and the testimony and evidence presented at the evidentiary hearings on October 21, 22, and 26, 2004, it is hereby ORDERED that the Defendants' Motions to Suppress (Docket Nos. 24, 25, and 35) are DENIED.

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE